IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ERIC D. NORRIS	:	**CIVIL ACTION**
v.	:	
MARILYN BROOKS, et al.	:	**NO. 06-5509**

CERTIFICATE OF SERVICE

I, MOLLY B. SELZER, hereby certify that on March 2, 2007 a copy of the foregoing pleading was served by placing same, first-class, postage prepaid, in the U.S. Mail, addressed to:

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/s/ Molly B. Selzer

____

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RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

LYNNE ABRAHAM, District Attorney of Philadelphia County, by THOMAS W. DOLGENOS, Chief, Federal Litigation, and MOLLY B. SELZER, Assistant District Attorney, on behalf of respondents, respectfully requests that the Petition for Writ of Habeas Corpus be denied without a hearing and, in support thereof, states:

On the night of May 17, 1998 into the early morning hours of May 18, 1998, petitioner and his cousin, Juan Canty (also known as Christopher Norris) got into a scuffle with the victim, Charles Shamwell, and his friends at a nightclub on Germantown Avenue in Philadelphia. The fray spilled out onto the street, where petitioner and Canty beat the victim senseless with "The Club," a metal anti-theft device used to secure car steering wheels. Mr. Shamwell survived the attack, but suffered broken bones in his left eye socket, complete loss of hearing for two months, and lacerations that required forty stitches on the top of his head and eight stitches on his left ear.

On August 21, 2001, following a bifurcated non-jury trial, the Honorable Richard B. Klein convicted petitioner of aggravated assault, simple assault, recklessly endangering another person, possessing an instrument of crime and criminal conspiracy. Immediately following the pronouncement of the verdict, petitioner raised his hand and stated that he had wanted to testify but had been prevented from doing so by counsel.

Therefore, Judge Klein permitted trial counsel, Edward Meehan, Jr., Esquire, to withdraw, and appointed new counsel, Louis B. Priluker, Esquire.

On December 14, 2001, the trial court held a hearing on whether Mr. Meehan had been ineffective for supposedly "coercing" petitioner into waiving his rights to a jury trial and to testify on his own behalf, as well as failing to call several witnesses defendant would have liked him to call. The trial court determined that counsel was not ineffective, and proceeded immediately to sentencing.

Although the Commonwealth provided petitioner with notice of intent to seek the mandatory minimum sentence under 42 Pa.C.S.A. § 9714 (Pennsylvania's "three strikes" law), which required petitioner be sentenced to twenty-five to fifty years' imprisonment, the trial court refused to impose such a sentence and instead sentenced petitioner to ten to twenty years' imprisonment for aggravated assault, and concurrent terms of six to twelve years for criminal conspiracy, and two and one-half to five years for possessing an instrument of crime (Trial Court Opinion attached as Exhibit A).[1]

The Commonwealth appealed petitioner's sentence, and on March 10, 2003, the Pennsylvania Superior Court vacated the sentence and remanded the case for resentencing in accordance with the three strikes law. Commonwealth v. Norris, 819 A.2d 568 (Pa. Super. 2003).[2]

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[1] Petitioner's remaining convictions merged for purposes of sentencing.

[2] Petitioner filed a cross-appeal, docketed at 662 EDA 2006, but in it, he did not raise any of his own allegations of error. Rather, he chose only to respond to the Commonwealth's sentencing claim. This appeal was therefore dismissed by the Superior Court in the same order and opinion in which it vacated petitioner's sentence and remanded for resentencing. Commonwealth v. Norris, 819 A.2d 568 (Pa. Super. 2003). Petitioner did not file a petition for allowance of appeal with the Pennsylvania Supreme Court following this order.

On July 1, 2003, petitioner appeared before the Honorable Shelly Robins-New[3] and was resentenced to the mandatory term of twenty-five to fifty years' incarceration for aggravated assault, and concurrent terms of six to twelve years for criminal conspiracy, and two and one-half to five years for possessing an instrument of crime. He did not appeal.

On August 4, 2003, petitioner filed a pro se petition for relief under the Post Conviction Releif Act (PCRA), 42 Pa.C.S. § 9541, et seq. Counsel J. Matthew Wolfe, Esquire, was appointed, and filed an amended petition on petitioner's behalf in which he raised, inter alia: (1) an allegation of trial counsel ineffectiveness for failing to move for dismissal of the charges against petitioner due to the alleged violation of petitioner's rule-based right to a speedy trial under Pa.R.Crim.P. 600 (Rule 600), as well as his federal and state constitutional rights to a speedy trial; and (2) an allegation of post-trial and appellate counsel ineffectiveness for failure to preserve at any earlier stage of the proceedings petitioner's above claim of trial counsel ineffectiveness (Amended Petition Under Post Conviction Relief Act, filed March 23, 2004, at unnumbered pages 2-3; and accompanying Memorandum of Law at unnumbered pages 6-9, collectively attached as Exhibit B).

On December 27, 2004, the PCRA court dismissed petitioner's PCRA petition without a hearing (PCRA Court Opinion, filed July 26, 2005, attached as Exhibit C).

Petitioner, through counsel Wolfe, appealed the dismissal of his PCRA petition. Counsel chose to abandon, at this stage of the proceedings, any ineffectiveness allegation based on supposed violations of petitioner's rights to a speedy trial, under both the

[3] By this date, Judge Klein had assumed a position on the Superior Court.

federal and state constitutions as well as Rule 600 (See petitioner's Brief on Behalf of Appellant, filed November 14, 2005, attached as Exhibit D). Petitioner, unsatisfied with counsel's choice, filed a pro se "Supplemental Amendment to Appellant['s] Brief," in which he alleged that Mr. Wolfe was ineffective for failing to include the Rule 600-based allegation of trial counsel ineffectiveness in his initial brief, and requesting that Mr. Wolfe be dismissed as counsel, and that new counsel be appointed (See Commonwealth v. Norris, 905 A.2d 1047 (Pa. Super. 2006) (Table) (Memorandum Opinion at 5-6, attached as Exhibit H); pro se "Supplemental Amendment to Appellant Brief," filed January 3, 2006, attached as Exhibit E; pro se "Motion for Remand," filed February 8, 2006, attached as Exhibit F). Petitioner did not raise any complaint regarding counsel's decision not to include the constitutional speedy trial claims, or any allegation of post-trial or appellate counsel ineffectiveness.

In accordance with Commonwealth v. Battle, 879 A.2d 266, 268-270 (Pa. Super. 2005), the Superior Court ordered counsel to file a petition for remand addressing petitioner's allegations of ineffectiveness so that the court could review the matter, and determine whether remand was necessary. Counsel complied, stating in his counseled Petition for Remand that he had strategically chosen not to include the Rule 600-based claim of trial counsel ineffectiveness in his brief because he was persuaded by the PCRA Court's opinion, as well as his own further research into the matter, that the claim lacked merit (counseled Petition for Remand, filed March 14, 2006, attached as Exhibit G).

On June 7, 2006, the Superior Court affirmed the lower court's order dismissing petitioner's PCRA petition, basing its decision in part on a finding that Mr. Wolfe was not ineffective for failing to include the Rule 600-based allegation of ineffectiveness in his brief. Commonwealth v. Norris, 905 A.2d 1047 (Pa. Super. 2006) (Table) (Memorandum Opinion attached as Exhibit H).

Petitioner filed an allocatur petition with the Pennsylvania Supreme Court, which was denied on October 17, 2006. Commonwealth v. Norris, 909 A.2d 1289 (Pa. 2006) (Table).

On January 5, 2007, petitioner filed the present petition for writ of habeas corpus in which he alleges that trial and appellate counsel were ineffective for failing to preserve his rights to a speedy trial pursuant to both the Pennsylvania and United States Constitutions, as well as Pennsylvania Rule of Criminal Procedure 600. Respondents deny that petitioner is entitled to federal habeas relief. Petitioner's claims are procedurally defaulted and are, in any event, without merit. Therefore, the petition should be dismissed.

FACTS

On May 17, 1998, Charles Shamwell attended a graduation party for Phil Enoch, his girlfriend's brother, at Casablanca, a nightclub on Germantown Avenue in Philadelphia. Petitioner was attending a birthday party for Alfredo Williams at the same club. At approximately 2:00 a.m. on May 18, defendant's cousin Juan Canty, who was also attending Mr. Williams's birthday party, shoved a piece of cake into Mr. Enoch's girlfriend's face when she would not give him a piece of it. A fight ensued between Mr. Enoch, Canty, and several others, including petitioner, who tried to hit Mr. Enoch in the back of the head. Mr. Shamwell and other party guests attempted to break up the fight and petitioner, Canty and other brawlers were evicted from the club by security (N.T. 8/2/01, 13-27).

Shortly thereafter, Mr. Shamwell, his girlfriend Gwendolyn Enoch, and Wanda Jenkins left the club. As Mr. Shamwell held open the door for the women, petitioner came up behind him and hit him twice in the back of the head with "The Club," a metal security device used to lock car steering wheels, causing Mr. Shamwell to lose consciousness and fall to the ground. Petitioner continued to hit the unconscious victim as he lay on the ground, and Canty, who had been in the middle of the street yelling obscenities, began jumping on the victim's chest. While Ms. Jenkins summoned police, Ms. Enoch tried to protect the victim. However, as soon as she had pulled one assailant away from Mr. Shamwell, the other would resume his attack. Ms. Enoch lost count of the number of blows petitioner inflicted on Mr. Shamwell, which were so severe that the victim's head was bouncing off the concrete. Eventually, she covered Mr. Shamwell's head with her own body (N.T. 8/2/01, 28-34, 59-61).

The attack did not stop until someone grabbed petitioner's arm as he prepared to swing the Club yet again. Canty and petitioner fled around the corner and drove away in a green Chevy Corsica. The car was stopped based on a police radio broadcast and the bloody Club was recovered. Canty was arrested,[4] but petitioner fled on foot. As a result of the attack, Mr. Shamwell suffered broken bones in his left eye socket and lost hearing completely for two months. He received 40 stitches on the top of his head and eight stitches on his left ear and was out of work for two months (N.T. 8/2/01, 33, 76-79, 94-95).

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[4] Canty, who was also known by the name Christopher Norris, subsequently pleaded guilty to his involvement in the attack on Mr. Shamwell.

DISCUSSION

AEDPA Standard of Review

The petition in this case is governed by the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which became effective on April 24, 1996. See Lindh v. Murphy, 521 U.S. 320 (1997) (discussing the effective date of AEDPA and its application). The AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given affect to the extent possible under law." Bell v. Cone, 535 U.S. 685, 693 (2002). See also Johnson v. Carroll, 369 F.3d 253, 257 (3d Cir. 2004) ("AEDPA greatly circumscribes a federal habeas court's review of a state court decision"). The statute provides that an application shall not be granted "with respect to any claim that was adjudicated on the merits in State court . . . unless the adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

28 U.S.C. § 2254(d).

The requirement that federal courts respect reasonable state court decisions on federal questions represents a marked departure from prior habeas practice. This is particularly true in the review of mixed questions; i.e., questions, such as claims of ineffectiveness of counsel, which involve an application of the law to the facts. See Williams v. Taylor, 529 U.S. 362, 412-413 (2000).

Under this deferential standard, a court "must first decide what constitutes 'clearly established Federal law, as determined by the Supreme Court of the United States.'" Lockyer v. Andrade, 538 U.S. 63, 71 (2003). See also Yarborough v. Alvarado, 541 U.S. 652, 660-61 (2004). "That statutory phrase refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." Williams, 529 U.S. at 412. See also Johnson v. Carroll, supra. Once the applicable "clearly established federal law" is established, petitioner must establish that the state court decision is either contrary to that precedent or an unreasonable application of that precedent.

"A federal habeas court may issue the writ under the 'contrary to' clause if the state court applies a rule different from the governing law set forth in [the United States Supreme Court] cases, or if it decides a case differently than [the Court has] done on a set of materially indistinguishable facts." Bell v. Cone, 535 U.S. 685, 694 (2002). See also Price v. Vincent, 538 U.S. 634, 639-640 (2003); Early v. Packer, 537 U.S. 3, 7-8 (2002). The Court has been careful to note that most cases will not fit into this narrow category, which is limited to direct and unequivocal contradiction of Supreme Court authority. Williams, 529 U.S. at 406-407.

Relief may be granted under the "unreasonable application" clause "if the state court correctly identifies the governing legal principal from [the Supreme Court's] decisions but unreasonably applies it to the facts of the particular case." Bell 535 U.S. at 694. It is petitioner's burden to show that the state court's analysis was "**objectively** unreasonable." Woodford v. Visciotti, 537 U.S. 19, 25 (2002) (emphasis added). The state court's analysis will not be deemed objectively unreasonable simply because a habeas court concludes in its independent judgment that the state court "applied clearly established federal law erroneously or incorrectly." Williams, 529 U.S. at 411. See also Lockyer 583 U.S. at 75 (2002)("[i]t is not enough that a federal habeas court, in its 'independent review of the legal question,' is left with a 'firm conviction' that a state court was 'erroneous'").

The Supreme Court has repeatedly emphasized that this AEDPA standard is mandatory and prohibits a federal court from deciding the case based on its own independent evaluation of the claims. See Price v. Vincent, supra (reversing a sixth circuit decision that evaluated a habeas claim without reference to the deferential review required by AEDPA). The AEDPA standard of review "demands that state court decisions be given the benefit of the doubt." Woodford, 537 U.S. at 24. Further, federal courts must presume that "state courts know and follow the law." Id. Therefore, this reasonableness analysis applies even when the state court failed to cite any Supreme Court cases, or even show an awareness of the Supreme Court cases. Early, 537 U.S. at 11. See also Priester v. Vaughn, 382 F.3d 394, 398 (3d Cir. 2004) ("as long as the reasoning of the state court does not contradict relevant Supreme Court precedent, AEDPA's general rule of deference applies").

Procedural Default

The procedural posture petitioner's claims requires that they be reviewed bearing AEDPA's strict exhaustion and procedural default requirements in mind. "Before seeking a federal writ of habeas corpus, a state prisoner must exhaust available state remedies, 28 U.S.C. § 2254(b)(1), thereby giving the State the 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights.'" Baldwin v. Reese, 541 U.S. 27, 29 (2004), *quoting* Duncan v. Henry, 513 U.S. 364, 365 (1995)(per curiam). See also O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999) (same). The exhaustion requirement "is grounded in principles of comity and reflects a desire to 'protect the state courts' role in the enforcement of federal law.'" Castille v. Peoples, 489 U.S. 346, 349 (1989), *quoting* Rose v. Lundy, 455 U.S. 509 (1982). The burden is on petitioner to prove all facts entitling him to habeas relief, including the facts relevant to the exhaustion requirement. See Lambert v. Blackwell, 134 F.3d 506, 513-514 (3d Cir. 1998); Toulson v. Beyer, 987 F.2d 984, 987 (3d Cir. 1993); Burkett v. Cunningham, 826 F.2d 1208, 1218 (3d Cir. 1987).

"Both the legal theory and the facts supporting a federal claim must have been submitted to the state courts." Lesko v. Owens, 881 F.2d 44, 50 (3d Cir. 1989). "It is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made." Anderson v. Harless, 459 U.S. 4, 6 (1982). "Mere similarity" between the claim raised at the state level and a federal claim is not sufficient. Duncan, 513 U.S. at 366. The claim must be presented to the state courts in such "a manner that puts [the state court] on notice that a federal claim is being asserted.'" Keller v. Larkins, 251 F.3d 408, 413 (3d Cir. 2001), *quoting* McCandless v. Vaughn, 172 F.3d 255, 261 (3d Cir. 1999).

Claims presented on habeas review must have been properly presented to each level of the state courts in order to give each a **fair opportunity** to review the claim. See Doctor v. Walters, 96 F.3d 675, 678 (3d Cir. 1996) (to satisfy the exhaustion requirement petitioner must give each level of the state courts a fair opportunity to address his claims). "[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process". O'Sullivan, 526 U.S. at 845.

Petitioner has not met his burden under the above legal standards and his petition cannot entitle him to any relief.

PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS ARE PROCEDURALLY DEFAULTED AND, IN ANY EVENT, MERITLESS.

Petitioner claims that he was denied effective assistance of counsel in violation of his Sixth Amendment rights in several respects, all having to do with his underlying constitutional and rule-based rights to receive a prompt trial. Although petitioner largely presents his allegations of error together as one overarching claim, they will be addressed here in their component parts, for the sake of clarity, and for the court's convenience. When broken down into specific allegations of error, petitioner's claims can be analyzed as follows: 1) a claim that trial counsel was ineffective for failing to move for dismissal of the charges against petitioner on grounds that his right to a speedy trial pursuant to Pennsylvania Rule of Criminal Procedure 600 (Rule 600) had been violated; 2) a claim that trial counsel was ineffective for failing move for dismissal of the charges against petitioner on the grounds that his right to a speedy trial under the Pennsylvania and United States constitutions had been violated; and 3) a claim that appellate counsel was ineffective for failing to raise the alleged constitutional and rule-based speedy trial violations. Each of these claims has been procedurally defaulted and therefore cannot entitle petitioner to habeas relief. They are also, in any event, without merit.

1. Petitioner's claim that trial counsel was ineffective for failing to move for dismissal under Rule 600 is procedurally defaulted and meritless.

Petitioner claims that trial counsel was ineffective for failing to move for dismissal of the charges against him under Pennsylvania Rule of Criminal Procedure 600 (Rule 600) (Memorandum of Law in Support of Habeas Petition at 3). This claim was not presented to each level of Pennsylvania's courts. It is therefore procedurally defaulted. O'Sullivan, 526 U.S. at 845; Doctor, 96 F.3d at 678.

Petitioner first raised his instant claim in his PCRA petition. The PCRA court found that the underlying Rule 600 claim was meritless, and that trial counsel therefore could not be faulted for foregoing it (PCRA Court Opinion, filed July 26, 2005, at 10-13, attached as Exhibit C). In order to exhaust this claim by invoking one complete round of Pennsylvania's established appellate review process, petitioner was required to present it to the Pennsylvania Superior Court in his appeal from the dismissal of his PCRA petition. See Doctor, supra. He failed to do so.

Collateral appeal counsel chose not to include this claim in his brief on appeal from the dismissal of petitioner's PCRA petition, having been persuaded by the PCRA courts' opinion and his own research that the underlying allegation of a Rule 600 violation was without merit (counseled Petition for Remand, filed March 14, 2006, attached as Exhibit G). Petitioner, displeased with counsel's strategic choice, alleged counsel's ineffectiveness in several pro se filings, and requested that new counsel be appointed. He did not, however, seek to proceed to pro se so that he could raise whatever claims he saw fit, rather than relying on the strategic choices of counsel. See Commonwealth v. Grazier, 713 A.2d 81 (Pa. 1998) (setting forth the procedure by which a criminal defendant on collateral appeal may voluntarily waive his right to counsel and proceed pro se). Rather, he wished to have counsel raise whatever claims he demanded, whether counsel believed those claims to be frivolous or not, a course of action that would have been unethical and a violation of counsel's professional obligations of candor to the court. See, e.g., U.S. v. Cronic, 466 U.S. 648 (1984) (if there is no bona fide defense to criminal charge, counsel cannot create one unethically and attempt useless charade thereunder); U.S. v. Starnes, 14 F.3d 1207, 1212 (7th Cir. 1994) (counsel cannot be held ineffective for not attempting to "manufacture evidence" on behalf of client, or otherwise present facts to tribunal known not to be true); compare Rules 1.2(d), 1.4(a)(5), 3.1, 3.3(a), 3.3(b), 3.4(b), 3.4(e), 8.4(c), 8.4(d), Model Rules of Professional Conduct (attorneys are strictly prohibited from misrepresenting facts or law to tribunal, to opposing parties, or to other persons even at client's request).

Consequently, the only pertinent issue before the Superior Court on collateral appeal was whether or not collateral appeal counsel was ineffective for choosing to forego the issue of trial counsel's alleged ineffectiveness for failing to move for dismissal under Rule 600. This is a distinct claim from the underlying issue of trial counsel ineffectiveness. A habeas petitioner does not fairly present an ineffectiveness claim by merely raising the underlying issue in the state courts. An ineffectiveness claim concerns the performance of counsel, and only indirectly implicates the underlying claim, Senk v. Zimmerman, 886 F.2d 611, 614 (3d Cir.1989). Both the **legal theory** – in this case, a claim of **trial counsel** ineffectiveness – and the facts supporting a federal claim must have been submitted to the state courts in order for a petitioner to meet the exhaustion requirement. See Lesko, 881 F.2d at 50. See also Duncan, 513 U.S. at 366 ("Mere similarity" between the claim raised at the state level and a federal claim is not sufficient to avoid default).

A reading of the Superior Court's opinion makes this distinction clear. In finding that collateral appeal counsel had not been ineffective, the Superior Court explicitly did **not** rule on the underlying merits of the claim of trial counsel ineffectiveness, finding that claim waived. Commonwealth v. Norris, 905 A.2d 1047 (Pa. Super. 2006) (Table) (Memorandum Opinion, 8, attached as Exhibit H). Rather, the court addressed only the merits of the claim actually before it, the allegation with respect to collateral appeal counsel. It ruled that petitioner had failed to establish that collateral appeal counsel had "no reasonable strategic basis" for his chosen course of action, and that therefore petitioner's allegation of ineffectiveness with respect to collateral appeal counsel was meritless. "[T]he ineffectiveness claim against current counsel is meritless. Here, where [collateral appeal counsel] alleges that he made a strategic decision to forego the underlying issue on appeal based upon his understanding of the record and the law . . . we conclude that Appellant could not establish that counsel had no reasonable strategic basis for the challenged action." Id. at 8.

As the Superior Court never addressed the underlying merits of petitioner's instant ineffective assistance of trial counsel claim because it was not properly presented, the claim is procedurally defaulted and cannot entitle petitioner to any relief on habeas review. 28 U.S.C. § 2254(b)(1); Duncun, supra at 365. Therefore, unless petitioner can present evidence of cause and prejudice or a miscarriage of justice, this claim must be dismissed. Petitioner fails to present any evidence of cause and prejudice or a miscarriage of justice for any of the claims raised in this petition. When a petitioner does not even allege cause and prejudice, the procedural default cannot be excused. Teague v. Lane, 489 U.S. 288, 298 (1989)(holding that petitioner's failure to allege cause for his default precluded federal habeas review of defaulted claim). Further, to demonstrate a miscarriage of justice a petitioner must come forward with new evidence of actual innocence. Schlup v. Delo, 513 U.S. 298, 327 (1995). When a petitioner fails to even allege facts relevant to this analysis, as petitioner fails to do here, he cannot meet his burden and federal review would therefore be inappropriate. Therefore, the default cannot be excused and petitioner's claim of trial counsel ineffectiveness for failing allege a violation of Rule 600 prior to trial must be dismissed.

Even if this claim were not procedurally defaulted – and it is – it is also without merit. The crux of petitioner's ineffectiveness claim here is that his rule-based, state-law right to a speedy trial was violated, and that trial counsel was ineffective for not recognizing this supposed violation and moving for dismissal of the charges against petitioner. Specifically, petitioner opines that the PCRA court used the wrong start date in calculating how many days elapsed between the filing of the criminal complaint in this matter and the start of trial, the relevant time frame for speedy trial claims under Rule 600. Pa.R.Crim.P. 600 (a)(2)(e), (g). Petitioner also alleges that the Commonwealth failed to act with due diligence in bringing him to trial within the required time frame, in violation of the Rule. The state courts have already undertaken a detailed analysis of the state law involved, however, and have determined that no Rule 600 violation occurred in petitioner's case (PCRA Court Opinion, filed July 26, 2005, at 10-13, attached as Exhibit C; Commonwealth v. Norris, 905 A.2d 1047 (Pa. Super. 2006) (Table) (Memorandum Opinion, 8-12, attached as Exhibit H)). This Court cannot reexamine that state court determination of a state law question. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) (explaining that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions"); see also Priester v. Vaughn, 382 F.3d 394, 402 (3d Cir. 2004) (holding that state court ruling on state claim which formed basis of ineffectiveness claim was binding in federal habeas); Clark v. Groose, 16 F.3d 960, 964 (8th Cir. 1994) (same). Because the PCRA court's determination that no Rule 600 violation occurred is binding on this court, petitioner's claim must fail, for counsel cannot be ineffective for failing to raise a meritless claim. United States v. Sanders, 165 F.3d 248, 253 (3d Cir. 1999) ("There can be no Sixth Amendment deprivation of effective counsel based on an attorney's failure to raise a meritless argument."); United States v. Fulford, 825 F.2d 3, 9 (3d Cir. 1987) (failure to pursue a meritless claim cannot amount to ineffective assistance of counsel).

2. Petitioner's claim that trial counsel was ineffective for failing move for dismissal on the grounds that his right to a speedy trial under the Pennsylvania and United States constitutions had been violated is procedurally defaulted and cannot entitle him to habeas relief.

Petitioner also claims that his right to a speedy trial as guaranteed in the Pennsylvania and United States constitutions was violated, and that trial counsel was ineffective for not pursuing dismissal of the charges against him on these grounds (Memorandum of Law in Support of Habeas Petition at 12). Petitioner completely abandoned these claims after raising them for the first time in his PCRA petition, and did not seek review of them in the Superior Court. See Commonwealth v. Norris, 905 A.2d 1047 (Pa. Super. 2006) (Table) (Memorandum Opinion, attached as Exhibit H). He therefore failed to subject them to one complete round of the established state appellate review process, and cannot now seek review of them in federal court. Doctor, 96 F.3d at

678 (to satisfy the exhaustion requirement petitioner must give each level of the state courts a fair opportunity to address his claims). His abandonment of these claims is underscored by the fact that although he filed several lengthy, pro se documents with the Superior Court on collateral appeal in which he maintained that his Rule 600-based speedy trial rights had been violated, nowhere in those filings did he contend that his constitutional rights to a speedy trial had been infringed upon, and that counsel had been ineffective for failing to raise such a claim (see pro se "Supplemental Amendment to Appellant Brief," filed January 3, 2006, attached as Exhibit E; pro se "Motion for Remand," filed February 8, 2006, attached as Exhibit F).

Moreover, as with petitioner's Rule 600-based allegation of ineffectiveness, petitioner has not recognized that his claim is defaulted, and has not argued, let alone established, that cause and prejudice or a miscarriage of justice excuse the default. Federal review is therefore unavailable to him. Teague, supra; Schulp, supra.

3. Petitioner's claim that appellate counsel was ineffective for failing to assert alleged violations of petitioner's constitutional and rule-based rights to a speedy trial is procedurally defaulted and, in any event, meritless.

Petitioner also asserts in passing, without fully developing the claim, that appellate counsel was ineffective for failing to raise the supposed constitutional and rule-based speedy trial violations (Memorandum of Law in Support of Habeas Petition at 3). As with petitioner's previous claims, this claim, too, was raised for the first time in petitioner's PCRA petition, and then abandoned on collateral appeal. It was never raised in the Superior Court. See Commonwealth v. Norris, 905 A.2d 1047 (Pa. Super. 2006) (Table) (Memorandum Opinion, attached as Exhibit H). It is therefore procedurally defaulted. Doctor, supra. And petitioner has not acknowledged the default, or argued that cause and prejudice, or a miscarriage of justice, excuse it. Such a claim cannot entitle petitioner to habeas relief. Teague, supra; Schulp, supra.

This claim is also woefully undeveloped and without merit. The relevant standard for reviewing claims of ineffective assistance of counsel is set forth in Strickland v. Washington, 466 U.S. 668 (1984). A Strickland analysis has two components – the performance prong and the prejudice prong. Petitioner is required to make a showing on both prongs or "it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." Strickland, 466 U.S. at 687.

Under Strickland, counsel is presumed effective, and to prevail on an ineffectiveness claim, a petitioner must "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689, *quoting* Michel v. Louisiana, 350 U.S. 91, 101 (1955). Given this presumption, a petitioner must first prove that counsel's conduct was so unreasonable that no competent lawyer would have followed it, and that counsel "made errors so serious that counsel was not functioning as 'counsel' guaranteed . . . by the Sixth Amendment." Strickland, 466 U.S. at 687. The Court explained the performance prong as follows:

> Judicial scrutiny of counsel's performance must be highly deferential.... A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct from counsel's perspective at the time. . . . [T]hat is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'

Id. at 689.

Additionally, a petitioner must meet the prejudice prong of Strickland by showing that "counsel's errors were so serious as to deprive [petitioner] of a fair trial whose result is reliable." Id. at 687. In other words, he "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. Furthermore, such determination must be made in light of "the totality of the evidence before the judge or jury." Id. at 695.

Strickland therefore imposes a "highly demanding" standard upon a petitioner to prove the "gross incompetence" of his counsel. Kimmelman v. Morrison, 477 U.S. 365, 382 (1986). Consequently, it is only the "rare claim" of ineffectiveness that should succeed. Buehl v. Vaughn, 166 F.3d 163, 169 (3d Cir. 1999) ("Because counsel is afforded a wide range within which to make decisions without fear of judicial second-guessing, we have cautioned that it is 'only the rare claim of ineffectiveness that should succeed under the properly deferential standard to be applied in scrutinizing counsel's performance'"), *quoting* United States v. Gray, 878 F.2d 702, 711 (3d Cir. 1989).

Petitioner focuses his entire argument upon the supposed errors of trial counsel, and provides no separate argument as to why appellate counsel was ineffective. It is also unclear from petitioner's cursory mention of this claim in his Memorandum of Law whether he wishes to assert only that direct appeal counsel was ineffective, or whether he wishes to assign blame to collateral appeal counsel in this regard. In either case, as the underlying allegations of error had been waived by trial counsel, neither direct appeal counsel nor collateral appeal can be faulted for failing to raise them on appeal. Issues not raised in the lower court may not be raised for the first time on appeal. Pa.R.A.P. 302(a); Commonwealth v. Dennis, 695 A.2d 409, 411 (Pa. 1997); Commonwealth v. Lawson, 762 A.2d 753, 758 (Pa. Super. 2000). Therefore, counsel cannot have been ineffective for failing to raise the supposed speedy trial violations on direct appeal or collateral appeal, as they could not have entitled petitioner to any relief. See Sanders, supra; Fulford, supra. See also Strickland, 466 U.S. at 694 (1984) (in order to succeed on an ineffectiveness claim, a petitioner must show that "but for counsel's unprofessional errors, the result of the proceeding would have been different").

CONCLUSION

Therefore, respondents respectfully request that the Petition for Writ of Habeas Corpus be dismissed without a hearing.

Respectfully submitted,

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